

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON ,) NO. 61353-7-I
)
Respondent,)
)
v.) UNPUBLISHED OPINION
)
OSCAR UCEDA,)
)
Appellant.) FILED: June 8, 2009

BECKER, J. — Oscar Uceda asks this court to reverse his convictions for first degree theft, bribing a witness, and tampering with physical evidence.¹ He contends that he was denied effective assistance of counsel because his counsel did not object to some of his former defense counsel's testimony. But the testimony was not objectionable because it did not reveal confidential communications, and he was not prejudiced by it.

Uceda also argues that his convictions must be reversed because the jury

¹ Although the judgment and sentence refers to RCW 9A.72.150, which describes the gross misdemeanor of tampering with physical evidence, the judgment and sentence names the crime as “tampering with physical witness.”

venire was not drawn from King County as a whole. But under a recent Supreme Court decision, that argument also fails. We affirm Uceda's convictions.

FACTS

Maria Lopez-Valenzuela² is an immigrant who speaks little English. She responded to Oscar Uceda's advertisement for real estate services in a Spanish-language newspaper. On December 12, 2004, Lopez-Valenzuela agreed to buy a house from Uceda. She gave him two checks totaling \$8,000. That night, she changed her mind and called Uceda to cancel the deal. But Uceda offered to find her a different house, so Lopez-Valenzuela agreed to let him keep her checks. Uceda, however, cashed the checks the next day. Whenever Lopez-Valenzuela called and asked for her money back, Uceda said he was trying to find her another house. She eventually complained to the police.

The State charged Uceda with theft in the first degree. The parties appeared for trial on October 23, 2007, but before a jury was sworn, scheduling problems arose and the parties agreed to recess until October 30, 2007.

When they returned for trial on the 30th, Uceda's lawyer, Timothy R. Johnson, gave the prosecutor a receipt signed by Lopez-Valenzuela, which

² Maria Lopez-Valenzuela is sometimes referred to in the record as Maria Valenzuela-Lopez. Because our record does not include the part of the trial transcript where she was sworn in, we cannot be certain about the correct order of her names.

reflected that Uceda repaid her in March 2005. The lawyers agreed that they needed more time to consider how the receipt affected the case, and the trial was postponed.

Before the next trial date, Lopez-Valenzuela told the prosecutor that Uceda came to her house on October 29, 2007, gave her \$8,000, and asked her to sign the receipt in exchange for her not coming to court and testifying against him. The State, therefore, asked to be allowed to amend the information to add charges of bribery, witness tampering, and forgery. The parties agreed that Johnson had to withdraw because he could not potentially be a witness and represent Uceda at the same time, and the trial was continued again so that new counsel could be appointed.

The State amended the information to charge one count of theft in the first degree, one count of bribing a witness, one count of tampering with a witness, and one count of tampering with physical evidence. The prosecutor wanted the court to allow Johnson to testify. Uceda asked the court to prohibit Johnson from testifying. The court ruled that Johnson could testify after concluding that his anticipated testimony did not involve privileged communications and was more probative than prejudicial.

The jury found Uceda guilty of theft in the first degree, bribing a witness, and

tampering with physical evidence. The court dismissed the charge of tampering with a witness.

ANALYSIS

Uceda argues that he was denied his right to effective assistance of counsel and was prejudiced because his defense counsel did not object to testimony from Johnson that violated the attorney-client privilege. The State responds that defense counsel was not ineffective for failing to object, and even if he was, Uceda has not established that he was prejudiced.

The standards for reviewing ineffective assistance of counsel claims are well-established. The defendant must show that defense counsel's performance was deficient and, as a result, the defendant was prejudiced. State v. Reichenbach, 153 Wn.2d 125, 130, 101 P.3d 80 (2005). The claim fails if either part of the test is not satisfied. A defendant proves deficient performance by demonstrating that the representation fell below an objective standard of reasonableness. Prejudice is established by showing there is a reasonable possibility that, but for counsel's deficient conduct, the result would have been different. There is a strong presumption that counsel's representation was effective. The presumption of competency is rebutted if there are no conceivable tactical reasons to explain counsel's actions. Reichenbach, 153 Wn.2d at 130. Competency is determined by

considering the entire record at trial. State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001).

Uceda contends that his defense counsel was ineffective because he did not object when Johnson's testimony revealed trial strategy and confidential discussions about evidence and defenses. A statute and an ethics rule both prohibit attorneys from disclosing confidential information:

An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

RCW 5.60.060(2)(a). Under RPC 1.6(a),

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Uceda sets forth in his brief the testimony he contends was objectionable. Johnson confirmed that Uceda's defense throughout the case was that he had repaid Lopez-Valenzuela and that there was a receipt to that effect, but Uceda did not give Johnson the receipt until October 30. Johnson testified that Uceda said he had previously been unable to find the receipt, and that Uceda intended Johnson to show it to the jury.

Uceda argues that except for the part authenticating the receipt, the

testimony was protected by the attorney-client privilege. Most troubling, Uceda contends, is the testimony that Johnson did not see the receipt until the morning of trial.

Johnson's testimony, however, did not disclose confidential information. According to the statement of probable cause, Uceda told the police from the beginning that he had repaid Lopez-Valenzuela, so the defense that he had repaid her was not a confidential trial strategy.

The record also does not support Uceda's argument that Johnson disclosed confidential information when he testified that Uceda only recently found the receipt because it appears that Uceda himself would have testified to that effect if Johnson had not testified. In Uceda's trial memorandum, defense counsel stated that he expected Uceda to "testify that he repaid the money in March 2005, that the receipt's date reflects this timing, and that he only recently found the receipt."

Moreover, even if the testimony disclosed confidential information, it did not prejudice Uceda's case. On the contrary, Johnson's testimony bolstered Uceda's defense because Johnson testified that Uceda had claimed from the beginning that he had a receipt showing that he had repaid Lopez-Valenzuela. Furthermore, even without Johnson's testimony, the prosecutor may have been able to establish that it was only recently discovered because the parties had agreed before trial in October

to disclose any documents they planned to rely on at trial.

Uceda also cannot show that the outcome of the case is likely to have been different if defense counsel had objected to Johnson's testimony because defense counsel asked the court before trial to exclude Johnson as a witness, and the court refused. Moreover, even if Johnson had not testified, the case against Uceda was strong because Valenzuela-Lopez and her sons testified that Valenzuela-Lopez signed the receipt after Uceda paid her in October 2007. Therefore, Uceda's ineffective assistance of counsel claim fails.

Uceda next contends that he was denied his federal and state constitutional rights because the jury venire was not drawn from King County as a whole. He argues that RCW 2.36.055 and King County Local General Rule (LGR) 18 violate his rights under Const. Art. I, § 22 and Const. Art. IV, §§ 5 and 6.

RCW 2.36.055 was enacted in 2005 after King County Superior Court judges noticed that potential jurors were less likely to appear if summoned to a courthouse far from their homes. State v. Lanciloti, 165 Wn.2d 661, 663-64, 201 P.3d 323 (2009). The statute allows counties with more than one superior court facility to divide jury source lists into jury assignment areas:

In a county with more than one superior court facility and a separate case assignment area for each court facility, the jury source list may be divided into jury assignment areas that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area.

Jury assignment area boundaries may be designated and adjusted by the administrative office of the courts based on the most current United States census data at the request of the majority of the judges of the superior court when required for the efficient and fair administration of justice.

RCW 2.36.055. King County LGR 18 describes the method for creating jury source lists and was promulgated to effectuate the statute. Lanciloti, 165 Wn.2d at 665.

Uceda argues that RCW 2.36.055 violates his constitutional right to “a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed[.]” Const. Art. 1, § 22. He also argues that the Legislature did not have the authority to enact RCW 2.36.055 under Sections 5 and 6 of Article IV of our Constitution. Those sections authorize the creation and define the jurisdiction of the superior courts in Washington.

The Supreme Court rejected the same arguments that Uceda makes in Lanciloti. The Court held “that the legislature was within its power to authorize counties with two superior courthouses to divide themselves into two districts.” Lanciloti, 165 Wn.2d at 671.

Uceda further argues that LGR 18 deprived him of a jury venire that included a fair cross section of the community, in violation of the Sixth Amendment and RCW 2.36.080, which expresses the state policy of selecting jurors “at random from a fair cross section of the population of the area served by the court.” But Uceda

has not presented any evidence to show that the jury venire in his case violated the Constitution or the statute. We, therefore, decline to consider his claim. See Lanciloti, 165 Wn.2d at 671-72.

Uceda's judgment and sentence is affirmed.

Becker, J.

WE CONCUR:

Ajda, J.

Grosse, J.